1-13-1976

William Earl Boyd v. Commonwealth of Kentucky

Appellant's Brief 1975-SC-0995

APPELLANT'S BRIEF

3803

SUPREME COURT OF KENTUCKY

FILE NO. 75-995

WILLIAM EARL BOYD — APPELLANT

VS. APPEAL FROM WARREN CIRCUIT COURT
HON. THOMAS W. HINES, JR., JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief For Appellant has been mailed, postage prepaid, to Hon. J. David Francis, Judge, Warren Circuit Court, Warren County Courthouse, Bowling Green, Kentucky 42101; Hon. Morris Lowe, Commonwealth Attorney, 8th Judicial District, Bowling Green, Kentucky 42101; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 13th day of January, 1976.

J. Vincent Aprile II

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MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTIONS PRESENTED

I.

WAS APPELLANT DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE TRIAL JUDGE OVERRULED THE DEFENSE MOTION FOR A CONTINUANCE WHICH WAS BASED ON THE ABSENCE OF APPELLANT'S COURT-APPOINTED LEAD COUNSEL AND THE UNPREPAREDNESS OF APPELLANT'S ASSISTANT DEFENSE COUNSEL?

II.

WAS APPELLANT DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT FAILED TO POSTPONE THE TRIAL AND ORDER AN EVIDENTIARY HEARING TO DETERMINE APPELLANT'S COMPETENCY TO STAND TRIAL?

III.

WAS APPELLANT DENIED HIS CONSTITUTIONAL RIGHT TO FUNDAMENTAL FAIRNESS WHEN THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT THE EVIDENCE OF PREVIOUS FELONY CONVICTIONS COULD NOT BE CONSIDERED IN DETERMINING APPELLANT'S GUILT OR INNOCENCE ON THE PRIMARY CHARGE OF STOREHOUSE BREAKING?

IV.

DID THE COURT BELOW ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE BY PERMITTING THE READING OF THE INDICTMENTS AND TRIAL ORDERS PERTAINING TO APPELLANT'S PRIOR CONVICTIONS?

V.

DID THE PROSECUTOR'S IMPROPER COMMENTS DURING CLOSING ARGUMENT CONSTITUTE ERROR WHICH SUBSTANTIALLY PREJUDICED APPELLANT AND DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO "FUNDAMENTAL FAIRNESS?"

STATEMENT OF THE CASE

On July 16, 1970 appellant was indicted in the Warren Circuit Court for the offenses of storehouse breaking and being a habitual criminal because of four prior felony convictions in violation of KRS 433.190 and KRS 431.190 respectively (Transcript of Record hereinafter designated T. R., p. 2). According to count one of the indictment, appellant on July 9, 1970 did "break and enter the storehouse of Gibson's Discount Store. . .with the felonious intent to steal therefrom." The remaining counts of the indictment delineate appellant's four alleged previous convictions:

1) a conviction on January 18, 1961 for the offense of grand larceny which allegedly occurred on November 9, 1961;

2) a conviction on January 10, 1964 for the offense of dwellinghouse breaking which allegedly occurred on April 23, 1963;

3) a conviction on Jebruary 14, 1966 for the offense of robbery which allegedly occurred on January 18, 1966; and

4) a conviction on September 6, 1968 for the offense of storehouse breaking which allegedly occurred on March 22, 1968.

Contrary to his plea, appellant on November 20, 1970 was convicted of storehouse breaking and of being a habitual criminal; appellant was sentenced to confinement in the penitentiary for life (T. R., p. 16-A; Transcript of Evidence, hereinafter designated T. E., p. 155). On November 23, 1970 appellant's counsel filed a motion and grounds for a new trial (T. R., pp. 19-20). That same day the trial judge overruled the motion for a new trial and imposed final judgment (T. R., p. 21). No notice of appeal was filed within the authorized period.

Appellant subsequently attempted to secure a belated appeal by a post-conviction action pursuant to RCr 11.42 (T. R., pp. 22-50). The trial court overruled appellant's motion to vacate (T. R., p. 51) and that judgment was affirmed on appeal by this Court (T. R., p. 62).

Appellant next sought a belated appeal in the federal courts by filing a petition for habeas corpus. This action proved successful and appellant was granted a belated appeal (T. R., pp. 66-67, 68). Boyd v. Cowan, 519 F.2d 182 (6th Cir. 1975).

Appellant's notice of appeal was filed on July 8, 1975 (T. R., p. 63).

At appellant's trial in November of 1970, the prosecutor, in an effort to prove the primary offense charged, called Fred Lancaster, a detective sergeant on the Bowling Green Police Force (T. E., p. 43). Detective Lancaster testified that at approximately midnight on July 8, 1970 while on routine patrol in Bowling Green he drove past the rear of Gibson's Discount Store and observed appellant "standing by the open door" of the store (T. E., p. 45). The witness also testified that he saw another person standing nearby (T. E., p. 52). The officer drove by without stopping and slowly circled back to Gibson's Discount Store (T. E., p. 52). When the two individuals saw the police cruiser,

they ran away. Officer Lancaster pursued the fleeing pair in his car (T. E., p. 52). According to the witness, both appellant and the other man "dived" under the trailer part of a large truck (T. E., pp. 52-53). Detective Lancaster stopped his car and exited it. He testified that he could see appellant under the truck. However, when the other person came out from under the truck and began running away, Detective Lancaster pursued the fleeing suspect (T. E., p. 53). The witness with the assistance of other officers apprehended the man who fled from under the truck.

Detective Lancaster also recounted that "the west end of the screened-in area" of Gibson's Store "had been pulled up" to create an opening large enough to permit a person to crawl under it (T. E., pp. 54-55). Near this opening the police found "two trash cans completely full of ammunition and . . .twelve rifles and shotguns . . . and two sets of binoculars and a pistol, a handgun laying by itself and . . . a large screwdriver" (T. E., p. 56).

Detective Lancaster testified that the door at the rear of Gibson's Store "had been pried open with some kind of a tool" (T. E., p. 59). According to the witness, that same door was standing open when he first drive by the store and saw appellant (T. E., p. 60).

Worley Millard, the manager of Gibson's Discount Center, testified that on July 8, 1970, as the last person to leave the store, he locked all the doors to the establishment (T. E., pp. 80-84).

The next prosecution witness, Charles Forshee, testified that on the night in question he was the Deputy Jailer of Warren County (T. E., p. 88). As he was driving past Gibson's Store, Mr. Forshee heard on the police monitor in his car that a man was running from the store (T. E., p. 90). The witness drove to the rear of Gibson's store and found appellant under a trailer truck (T. E., p. 90). Mr. Forshee held appellant until the police officers

arrived (T. E., p. 91).

Appellant, a twenty-nine year old native of Bowling Green, testified that on the night in question he had been working at the body shop on Eleventh Street until about eleven o'clock (T. E., pp. 123-124). Appellant and Leon Sill had been sanding down a 1964 or 1965 Cadillac (T. E., p. 124).

Appellant was going to give Mr. Sill a lift home, but as they left the body shop appellant's car died (T. E., p. 124). When appellant discovered his car was out of gas, he and Mr. Sill secured an empty gas can from the shop and started walking to a service station (T. E., pp. 124-125).

Appellant noticed a police cruiser with its "blinker light " on. When the police car turned in his direction, appellant told Mr. Sill to get under the aluminum trailers (T. E., p. 125). Appellant told Mr. Sill, "Well, if they see me this way, they're going to take me in and try to get me for something which they always do, they see me out that late" (T. E., p. 125). While appellant was "ducked down" behind the trailor, Mr. Forshee pulled up and accosted appellant (T. E., p. 125). Immediately thereafter, the police arrived and took appellant into custody (T. E., p. 126).

Throughout his testimony, appellant vehemently denied breaking into Gibson's Discount Store (T. E., pp. 122, 126).

ARGUMENTS

I.

APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE TRIAL JUDGE OVERRULED THE DEFENSE MOTION FOR A CONTINUANCE WHICH WAS BASED ON THE ABSENCE OF APPELLANT'S COURT-APPOINTED LEAD COUNSEL AND THE UNPREPAREDNESS OF APPELLANT'S ASSISTANT DEFENSE COUNSEL.

The indictment in the instant case was returned on July 16, 1970 (T.R., p. 3). That same day the trial judge, after finding that appellant was indigent, appointed William Rudloff, "a regular practicing attorney at the Bowling Green Bar," to represent appellant (T.R., p. 3). On the following day the trial judge appointed Dixie Satterfield to represent appellant because Mr. Rudloff had "disqualified himself" (T.R., p. 4). Three days later on July 20, 1970, Dixie Satterfield in a written statement filed with the court noted that he had "investigated" the case and decided that "representation" of appellant would place him "in an untenable position" (T.R., p. 5). Subsequently, on July 22, 1970 the trial court excused Dixie Satterfield as counsel and appointed Leland Logan to represent appellant (T.R., p. 6).

On the initial day of trial, November 19, 1970, Mr. W. W. Evans of Louisville, Kentucky appeared on behalf of appellant and made the following statement:

> I came down today from Louisville today to assist Leland Logan in the trial of this case. Mr. Leland Logan was appointed by the Court, I understand; and I was informed he was in the Courthouse early this morning. I've never met the gentleman, and I've made several trips to his office to see him, but I've missed him. And under the circumstances, I will announce not ready for the defendant. I'm not ready to try this case (T.E., p. 1).

The prosecutor immediately objected to the defense attorney's request for a continuance stating:

> May it please the Court, this case has been on the docket for some six or seven weeks and has been assigned for trial this date. The Commonwealth is ready, our witnesses are ready, the exhibits are ready, and we're prepared to go to trial (T.E., p. 1).

Although the trial judge requested a report on the whereabouts of Leland Logan, appellant's appointed counsel, the record contains no entry to indicate that such a report was ever furnished the court (T.E., p. 1). Furthermore, a perusal of the trial transcript unequivocally establishes that Leland Logan did not appear as an attorney for appellant at any point in the trial.

The record reveals that the trial judge realized that Mr. Evans was unprepared to represent appellant without the assistance of Leland Logan, appellant's court-appointed counsel who had been the attorney of record for the four months preceding the trial. In an attempt to remedy the disadvantage to appellant, the trial judge at the last minute conscripted J. Reid Caudill, another local attorney, to assist the defense. This additional attorney was foisted on the defense when the trial judge announced:

> Mr. Caudill has consented to help qualify the jury, gentlemen, and the Court is informed that you are paid counsel, and this case has been on the docket for some time. The Court will have to proceed. Mr. Caudill here will help you qualify the jury. He's a local attorney (T.E., p. 2).

As the prosecutor attempted to commence his voir dire of the potential jurors, the trial judge interrupted to place the following remarks in the record:

> Just a minute. I want to put something in the record. Let the record show that the Court has designated Reid Caudill to help qualify the jury -- to assist employed counsel in any manner in the case of Commonwealth of Kentucky versus William (Wickie) Boyd. Court overrules the motion for a continuance. Court overrules the Motion for Continuance. Proceed, please (T.E., p. 3).

RCr 9.04 provides that "[t]he court, upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial." It is well settled that granting a continuance is in a large measure within the discretion of the trial court; but where it appears to the appellate court that in overruling the motion there was an abuse of judicial discretion, the judgment will be reversed in the interest of fairness and justice. Brashear v. Commonwealth, Ky., 328 S.W.2d 418, 419 (1959). "Under some circumstances, however, the facts may be so plain and demanding that a denial of a continuance will be deemed to be an abuse of discretion or be deemed to deny the accused substantial justice." 17 Am. Jr.2d, Continuance §36, citing Wilson v. Commonwealth, 134 Ky. 669, 121 S.W. 614 (1909). See also Johnson v. Commonwealth, Ky., 119 S.W. 745 (1909).

While the United States Supreme Court has recognized that the decision to grant or deny a continuance is within the discretion of the trial judge, that Court has recognized that a denial of a continuance in certain circumstances may violate the constitutional guarantee of due process.

In Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964), the Supreme Court explained:

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed.377. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. Chandler v. Fretag, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed.4. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due

> process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. Nilva v. United States, 352 U.S. 385, 77 S.Ct. 431, 1 L.Ed.2d 415; Torres v. United States, 270 F.2d 252 (C.A. 9th Cir.); cf. United States v. Arlen, 252 F.2d 491 (C.A.2d Cir). Id., 84 S.Ct. at 849-850.

The Court of Appeals for the Sixth Circuit in Giacalone v. Lucas, 445 F.2d 1238 (6th Cir. 1971), delineated the following guidelines for ascertaining whether the trial court abused its discretion in overruling a motion for continuance:

> Proper exercise of this discretion requires a delicate balance between the defendant's right to adequate representation of counsel at trial, and the public interest in the prompt and efficient administration of justice. On the one hand, a court may not insist upon expeditiousness for its own sake, but, on the other, a defendant cannot be allowed to insist upon unreasonable delay or inconvenience in the completion of his trial. What is a reasonable delay varies depending upon all the surrounding facts and circumstances. [Citations omitted.] Some of the factors to be considered in the determination of reasonableness are: the length of the delay requested; whether the lead counsel has associates prepared to try the case in his absence; whether other continuances have been requested and received; the convenience or inconvenience to litigants, witnesses, opposing counsel, and the court; whether the delay seems to be for legitimate reasons, or whether it is purposeful and dilatory; and other relevant factors. Id., at 1240.

In turning to the facts and circumstances of the request for a continuance in the instant case, a perusal of cases decided in the Commonwealth of Kentucky, the United States Court of Appeals, and the Supreme Court indicates that

the court below violated its discretion in overruling appellant's motion for continuance. It is submitted that the action of the Warren Circuit Court amounted to "a myopic insistence upon expeditiousness in the face of justifiable request for delay." Ungar v. Sarafite, supra.

Where an accused's lack of time to make adequate preparation for trial has no adverse effect on the preparation of his defense, refusal of a continuance would not be construed as a denial of due process. However, where it appears that the trial court's refusal operated to deprive an accused of a fair trial, the trial court's abuse of discretion demands reversal of the conviction. The rationale for this holding is bottomed upon the fundamental principle that any trial contemplates more than the mere travelling of a prescribed route through the courthouse. The proceedings in a criminal trial must include all of the safeguards afforded by the law to insure as near as possible a fair investigation of the facts which permits each side to the controversy to present their case and to develop the facts pertinent to the disposition of the charge. When a postponement of the trial is essential to enable an accused's counsel to develop his case and to present his client's defense, the overruling of a motion for continuance is a denial of due process. See Chenault v. Commonwealth, 282 Ky. 453, 138 S.W.2d 969 (1940).

It must be remembered that W. W. Evans, the attorney from Louisville, informed the trial judge that he had come only "to assist Leland Logan," appellant's appointed counsel, in representing appellant (T.E., p. 1). Furthermore, Mr. Evans explained that he had "never met" Leland Logan and his previous attempts "to see" Mr. Logan had been unsuccessful (T.E., p. 1). From Mr. Evans' comments to the trial judge, it is apparent that Mr. Logan was the "lead

counsel" for the defense. Although Mr. Evans had planned to function as an assistant defense counsel, his pretrial efforts to discuss the case with the "lead counsel" had been consistently frustrated. For this reason, when the "lead counsel" failed to appear on the day of trial, Mr. Evans candidly told the trial judge that he was "not ready to try" appellant's case (T.E., p. 1).

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), made it clear a decade ago that the right to counsel, guaranteed to federal defendants through the sixth amendment, is a fundamental right guaranteed to state defendants through the due process clause of the fourteenth amendment. Since the days of the "Scottsboro boys" rape case, Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), it has been accepted that a state defendant has a right not only to the timely appointment of counsel but also to the assistance of counsel whose quality of performance does not fall below a minimum level of effectiveness. See McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); Waltz, "Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases," 59 NW. U.L. Rev. 289 (1964). See also Reece v. Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955); Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940).

In Nelson v. Commonwealth, 295 Ky. 641, 175 S.W.2d 132 (1943), this Court explained:

> The constitutional right of one charged with the commission of a crime to be represented by counsel necessarily includes time for adequate preparation. The right to be represented by counsel would amount to nothing if counsel for the accused is not allowed reasonable time to prepare his defense.

> Adequate preparation by an attorney employed by one charged with a crime includes full consultation with his client, interviews with prospective witnesses, study of the facts and the law applicable thereto, and the determination of the character of defense to be made and the policy to be followed during the trial. Id., 175 S.W.2d at 133.

This Court has indicated quite clearly that "the Constitutional right to counsel would be almost worthless unless reasonable time were allowed counsel to familiarize himself with the case and to prepare the defense." Perkins v. Commonwealth, Ky., 305 S.W.2d 937, 939 (1957); see Benge v. Commonwealth, Ky., 346 S.W.2d 311 (1961).

Without proper preparation the trial defense attorney is inherently incapable of providing the type of effective legal representation demanded by the Sixth Amendment. In Smotherman v. Beto, 276 F.Supp. 579 (N.D.Tex. 1967), the court observed:

> The lawyer who does not probe, does not inquire, and does not seek out all the facts relevant to his client's case is prepared to do little more than stand still at the time of trial. Id., at p. 588.

It must be remembered that "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate." United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973). The court in DeCoster, supra, placed specific emphasis on the necessity of adequate investigation:

> Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that "all available defenses are raised" so that the government is put to its proof. This means that in most cases a defense attorney or his agent, should interview not only his own witnesses but also those that the government intends to call, when they

> are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research. Id., at 1204.

"A defendant who is subjected to the possibility of incarceration is entitled to have the avenues of defense explored by his counsel during the preparation of his case." United States v. Fisher, 477 F.2d 300, 302-303 (4th Cir. 1973). Although appellant faced a maximum sentence of only five years imprisonment on the primary charge of storehouse breaking (KRS 433.190), he faced the possibility of being adjudged a habitual offender which carried a mandatory penalty of confinement in the penitentiary for life (KRS 431.190). Not surprisingly, in view of defense counsel's admitted lack of preparation, appellant was convicted of the primary charge and adjudged a habitual offender.

In the case sub judice, the very fact that Mr. Evans admitted he was "not ready to try" appellant's case establishes that appellant was denied his constitutional right to the effective assistance of counsel.

As the court in Goodwin v. Swenson, 287 F.Supp. 166 (W.D. Mo. 1968), so aptly stated:

> The most able and competent lawyer in the world cannot render effective assistance in the defense of his client if his lack of preparation for trial results in his failure to learn of readily available facts which might have afforded his client a legitimate justiciable defense. Id., at pp. 182-183.

It must be remembered that "a lawyer who is not familiar with the facts and law relevant to his client's case cannot meet the required minimum level of effective assistance of counsel." Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974). In the case at bar it is beyond dispute that appellant's defense counsel "was not familiar" with the facts and law pertaining to appellant's trial.

Appellant was not indicted until July 16, 1970 (T.R., p. 3). As a result of the trial judge's overruling of appellant's motion for a continuance, appellant's trial started on November 19, 1970 -- approximately four months after the indictment was returned. In a case involving a possible sentence of life imprisonment such a speedy trial, particularly over defense objection, is inherently suspect.

In Davis v. Commonwealth, 310 Ky. 360, 220 S.W.2d 844 (1949), this Court recognized:

> It is appreciated that delay in the trial of a person accused of crime sometimes results in the miscarriage of justice. On the other hand, experience has taught that too speedy a trial sometimes has the same result from the defendant's standpoint. Id., at 845.

Certainly, "[a] request for a continuance of a trial is but a means to an end. The end is a fair trial." Johnston v. Commonwealth, 276 Ky. 615, 124 S.W.2d 1035, 1038 (1939).

Undoubtedly, the Commonwealth will insist that the transcript of the trial demonstrates that appellant's retained counsel performed competently and adequately. However, a trial defense counsel's courtroom performance is not the only measure of the caliber of assistance he provides his client. In Moore v. United States, 432 F.2d 730 (3rd Cir. 1970), it was noted that:

> [R]epresentation involves more than the courtroom conduct of the advocate. The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their attendance. Id., at p. 739.

Likewise, the Fifth Circuit Court of Appeals has concluded:

> Effectiveness of counsel is not tested merely by counsel's performance in the courtroom but must also be measured by the attorney's familiarity with the facts and the law of the case. Hollingshead v. Wainwright, 423 F.2d 1059, 1060 (5th Cir. 1970).

Consequently, the fact that there may be no glaring deficiencies in defense counsel's courtroom conduct does not refute the claim of ineffective assistance of counsel. The lack of preparation, admitted by counsel, constitutes sufficient substantiation of the assigned constitutional error. Courts have universally recognized that:

> In many instances ineffective assistance of counsel may have had so pervasive an effect on the process of guilt determination that it is impossible to determine accurately the presence or absence of prejudice. Green v. Rundle, 434 F.2d 1112, 1115 (3rd Cir. 1970).

Normally, an allegation of inadequacy of counsel is not reviewable on direct appeal in this jurisdiction. See Caslin v. Commonwealth, Ky., 491 S.W.2d 832 (1973). However, it must be recognized that there may be cases where it conclusively appears in the trial record itself that the defendant was not provided effective representation. This is one of those cases. The lack of preparation by defense counsel was explained to the circuit judge before the trial began. The court reporter transcribed the court-appointed counsel's admissions to the trial judge. That transcript is available for this Court's consideration. In these circumstances, nothing would be gained by postponing consideration of appellant's claim of ineffective assistance of counsel. See United States v. Fisher, supra.

One final point should be made. The issue of defense counsel's unpreparedness was manifestly brought to the trial judge's attention. Under these circumstances, the trial judge had an obligation to act to insure that appellant was not tried while represented by an unprepared attorney. As the Supreme Court has emphasized:

> [I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts. McMann v. Richardson, supra, 397 U.S. at 771.

In the instant case the trial judge, with full knowledge of the absence of appellant's court-appointed counsel and the admitted unpreparedness of appellant's assistant defense attorney, overruled the defense motion for a continuance without even questioning Mr. Evans as to the extent of his preparation. Furthermore, the trial judge declined to question appellant as to whether he wished to proceed to trial without the representation of Leland Logan, his court-appointed attorney. The trial judge allowed appellant to go to trial without even ascertaining whether Mr. Evans had ever consulted with appellant.

Obviously, trial judges are empowered to insist that counsel be prepared so that trials may be held as scheduled. In this regard, trial courts possess the authority to censure attorneys for dilatory tactics. See ABA Standards Relating to the Function of the Trial Judge, §1.4, 3.8 and 7.1 (Approved Draft, 1972). But conviction without effective legal representation is a misplaced sanction for the shortcomings of a defendant's attorney. United States v. Fisher, supra, at p. 304.

In Beasley v. United States, 491 F.2d 687 (6th Cir. 1974), the Sixth Circuit Court of Appeals rejected the "farce and mockery" standard for determining ineffective assistance of counsel and ruled:

> We hold that the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. [Citations omitted.] Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations. [Citations omitted.] Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner. Id., at p. 696.

Under the standard enunciated in Beasley, appellant was denied his right to the effective assistance of counsel when the trial court permitted him to be represented at trial by an attorney who was admittedly unprepared to try the case. Such a denial of the right to counsel mandates reversal of appellant's conviction.

II.

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT FAILED TO POSTPONE THE TRIAL AND ORDER AN EVIDENTIARY HEARING TO DETERMINE APPELLANT'S COMPETENCY TO STAND TRIAL.

On November 19, 1970 Leland Logan, an attorney appointed to represent appellant, filed a written motion requesting a continuance of the trial "until such time as a mental examination" of appellant could be "made at Western Kentucky State Hospital" (T.R., p. 7).

Since Mr. Logan failed to appear on behalf of appellant when the case was called for trial on November 19, 1970, the trial judge was unable to question him to ascertain the reasons which prompted him to seek a psychiatric evaluation of appellant. Faced with the motion for a continuance to secure a mental examination and the absence of appellant's court-appointed counsel, the trial court had an affirmative duty to conduct a hearing to determine whether appellant was competent to stand trial.

It is now an accepted principle of law that the trial of an accused while he is incompetent violates due process. Bishop v. United States, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956). Distinguishable from the standard used to determine mental culpability for a criminal act, the test for determining mental competence to stand trial is:

> The test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960).

The Court in Hansford v. United States, 365 F.2d 920 (D.C. Cir. 1966), explained:

> Subsumed under this formulation is the requirement that the defendant's memory and intellectual abilities, which are crucial to the construction and presentation of his defense, must not be substantially impaired by mental disorder. Id., at 922.

Kentucky has recognized the danger of trying a defendant who is incompetent. If at any time during the proceedings there are "reasonable grounds to believe that the defendant is insane," RCr 8.06 requires that "the proceedings shall be postponed and the issue of sanity determined as provided by law."

An accused person, even though he may have been sane at the time of the act charged, cannot be tried while presently insane. 21 Am. Jr. 2d, Criminal Law §62. Thus, insanity at the time of trial renders an accused incompetent to stand trial. For this reason, RCr 8.06, while addressing the issue of a defendant's incompetency to stand trial, uses the term "insane" to describe that condition.

In 1964 this Court adopted the test of Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) as the proper criteria for evaluating the mental competency of a defendant in a criminal case. In Commonwealth v. Strickland, Ky., 375 S.W.2d 701 (1964), the Court of Appeals stated:

> The terms "insane," "unsound mind," and "mental illness" are too loose to serve as a reasonable test of whether a person is properly fit to plead or defend himself in a criminal proceeding. For this purpose, whatever may be the technical classification of his mental state, legally or medically, the test is whether he has substantial capacity to comprehend the nature and consequences of the proceeding pending against him and to participate rationally in his defense. Id., at 703.

This test has also been explained in the following terminology:

> [Competency] denotes the intellectual and emotional capacity of the accused to perform the functions which are essential to the fairness and accuracy of a criminal proceeding. This includes present ability to consult with his lawyer with a reasonable degree of rational understanding. Pouncey v. United States, 349 F.2d 699, 701 (D.C. Cir. 1965).

In Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), the Supreme Court held that the failure to afford a defendant a hearing on his competency denies the accused his constitutional right to a fair trial. In the cited case, the Supreme Court also

enunciated an ancillary theorem that such a defendant cannot waive his right to have the court determine his capacity to stand trial.

Recently, in Via v. Commonwealth, Ky., 522 S.W.2d 848, 849 (1975), this Court analyzed the relationship between RCr 8.06 and the constitutional necessity of a due process competency hearing:

> The Supreme Court cases speak in terms of a hearing's being required when there is sufficient doubt of the defendant's competency as to require further inquiry, which does not differ materially from our requirement based on the existence of reasonable grounds to believe the defendant is insane.

The reasonable grounds must be called to the attention of the trial court by the defendant or must be so obvious that the trial court cannot fail to be aware of them, in which latter case a motion for a hearing on mental capacity is not required. Via v. Commonwealth, supra, at 848-849, citing Matthews v. Commonwealth, Ky., 468 S.W.2d 313 (1971).

The Ninth Circuit Court of Appeals in Smith v. United States, 267 F.2d 210 (9th Cir. 1959), explained:

> It is axiomatic in modern procedure that one who continues incapacitated by lack of understanding must never be tried or convicted of crime. A trial or judgment of conviction of such a person is without jurisdiction because of lack of due process. Id., at 211.

Likewise, this Court has recognized that if the defendant's mental competency has not been determined by the lower court, "on the basis of a fair hearing" that "it would be incumbent on the court to set the conviction aside." Commonwealth v. Strickland, supra, at 703-704.

When a motion for a continuance is made to permit an accused to have a psychiatric examination and the motion sets forth reasonable grounds to believe that the accused is incompetent, it is clearly error to deny the continuance and to refuse to have the defendant examined. United States v. Roca-Alvarez, 451 F.2d 843 (5th Cir. 1971). Such a motion can properly be denied only when it is frivolous or made in bad faith. Lewellyng v. United States, 320 F.2d 104, 105 (5th Cir. 1963); United States v. Walker, 301 F.2d 211 (6th Cir. 1962); Meador v. United States, 332 F.2d 935, 937 (9th Cir. 1964); Krupnick v. United States, 264 F.2d 213, 216 (9th Cir. 1959); Wear v. United States, 94 U.S. App. D.C. 325, 218 F.2d 24, 26 (1954); United States v. Knohl, 379 F.2d 427 (2nd Cir. 1967). Although these cases involve federal prisoners the same principles should apply to a defendant prosecuted in a state court in the circumstances disclosed by the record in the instant case. Bruce v. Estelle, 483 F.2d 1031, 1037, fn. 16 (5th Cir. 1973).

In the case sub judice, the motion for a continuance was sufficient to constitute reasonable grounds to believe that appellant may have been incompetent, particularly since the attorney who filed the motion was not present to justify his motion when the trial commenced. Likewise, it cannot be said that the motion for continuance was frivolous or made in bad faith. In order to hold that the motion was made in bad faith, it would be necessary for the court first to presume appellant's mental competency at the time the motion was made, thus begging the question at issue. Lewellyng v. United States, supra at 106.

Mr. Logan, the attorney who filed the motion in question, had been appellant's court-appointed counsel for the four months immediately preceding the trial. It is both

predictable and probable that Mr. Logan had acquired an intimate relationship with appellant. Such a relationship would have given Mr. Logan the best vantage point to assess appellant's competency to stand trial.

The Supreme Court in the recent case of Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), explicitly discussed the heavy weight which must be accorded a defense counsel's expression of concern over the psychiatric condition of an accused:

> However, we are constrained to disagree with the sentencing judge that counsel's pretrial contention that "the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial," did not raise the issue of petitioner's competence to stand trial. Id., 95 S.Ct. at 906.

Although the Supreme Court did not suggest that courts must accept without question a lawyer's representations concerning the competence of his client, they did conclude that "an expressed doubt in that regard by one with the closest contact with the defendant" is unquestionably a factor which should be considered. Id., 95 S.Ct. at 906 n.13.

It must also be remembered that appellant was being tried as an habitual offender under the authority of KRS 431.190. The Kentucky legislature has implicitly recognized that there is an increased probability that a person indicted under the habitual offender statute will have a mental disease or defect. This Court has construed the purpose of KRS 203.340 to be to determine whether an accused indicted under the habitual offender statute should be sent to one of this state's penal institutions or one of its mental hospitals. Harrod v. Commonwealth, 311 Ky. 810, 226 S.W.2d 4 (1950).

Under the circumstances of the instant case, the trial judge was required sua sponte to postpone the trial and order a hearing to determine appellant's present sanity and capacity to stand trial. The failure of the court below to take such actions, particularly in view of Mr. Logan's unexplained and unexpected absence, denied appellant his constitutional right to a fair trial.

Because the court below failed to direct sua sponte a hearing on appellant's competency, the conviction must be reversed.

III.

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO FUNDAMENTAL FAIRNESS WHEN THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT THE EVIDENCE OF PREVIOUS FELONY CONVICTIONS COULD NOT BE CONSIDERED IN DETERMINING APPELLANT'S GUILT OR INNOCENCE ON THE PRIMARY CHARGE OF STOREHOUSE BREAKING.

As previously explained, appellant was tried in a single proceeding for both the primary offense of storehouse breaking and for being a habitual criminal. During the course of the trial the prosecution introduced evidence of appellant's prior felony convictions (T.E., pp. 100-117). Appellant's defense counsel failed to request and the court did not of its own volition give an instruction admonishing the jury not to consider the evidence of prior convictions in determining guilt or innocence on the primary charge. See Lynch v. Commonwealth, Ky., 472 S.W.2d 263, 266 (1971); Satterly v. Commonwealth, Ky., 437 S.W.2d 929, 930 (1968).

In Evans v. Cowan, 506 F.2d 1248 (6th Cir. 1974), the Court of Appeals for the Sixth Circuit reviewed a remarkably similar factual situation involving a habeas corpus petitioner who had been tried and convicted in a Kentucky trial court. The petitioner in the cited case complained

that "no limiting instruction was given to the jury in connection with" the evidence of his four previous felony convictions which was introduced during his nonbifurcated trial.

In evaluating the merit of the petitioner's constitutional complaint, the court in Evans acknowledged that "the constitutionality of the practice of inflicting more severe criminal penalties upon habitual offenders is no longer open to serious challenge." Evans v. Cowan, supra, at 1249. Citing Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967), the Evans court emphasized that "the habitual criminal issue may be combined with the trial of the felony charge even though it is a separate and distinct issue." Evans v. Cowan, supra, at 1249, also citing Stewart v. Commonwealth, Ky., 479 S.W.2d 23 (1972).

However, in Evans, the Sixth Circuit Court of Appeals offered the following analysis of the constitutional implications of the trial court's failure to instruct the jury on the limited use of the evidence of the defendant's prior felony convictions:

> In Spencer v. Texas, supra, the Supreme Court closely examined the Texas practice of informing the jury of the prior convictions before the determination of the primary charges and found that it necessarily resulted in prejudice to the defendant. However, the prejudicial effect was held to be "justified on the grounds that . . . the jury is expected to follow instructions in limiting this evidence to its proper function . . . ." 385 U.S. at 562, 87 S.Ct. at 653. Said instruction contemplates an admonition not to consider the previous convictions as evidence of guilt on the primary charge. This safeguard instruction doctrine is not a stranger to Kentucky law. Lynch v. Commonwealth, 472 S.W.2d 263, 266 (Ky. 1971).

> In the instant case the jury was not instructed on the permissible uses of the evidence of previous convictions . . . .
>
> The Supreme Court made it clear in Spencer that the obvious prejudice to defendant could be tolerated only where the jury was admonished by the trial court not to use the evidence of previous convictions in determining guilt or innocence on the primary charge. Further, in the circumstances presented by the record before us we hold that the trial court had the duty to give a limiting instruction even if the defendant had not requested one. Evans v. Cowan, supra, at 1249.

Appellant acknowledges that his trial defense counsel neglected to request that the jury be admonished or instructed not to consider the evidence of previous convictions in determining appellant's guilt or innocence of the primary charge. However, appellant submits that the failure of the defense to request such a limiting instruction does not preclude appellate review.

In Evans v. Cowan, supra, the Sixth Circuit Court of Appeals rejected the argument that such a limiting argument must be requested by the defense before appellate review is available. Instead, the court in Evans was "convinced that the possibility of egregious unfairness was so great in the absence of a limiting instruction that the failure to give one constituted clear error." Evans v. Cowan, supra, p. 1249.

Even though appellant's counsel neglected to request such a limiting instruction, this Court should still review the allegation of constitutional error. In Stone v. Commonwealth, Ky., 456 S.W.2d 43 (1970), this Court acknowledged that an appellate court, if it believes there may have been a miscarriage of justice, should exercise its extraordinary power and reverse the judgment below even

though the specific error was never presented to the trial court. See CR 61.02 made applicable to criminal cases by RCr 13.04. In the case at bar the fact that the jury was allowed to consider the evidence of appellant's four prior felony convictions without any evidentiary limitations obviously created "a manifest injustice."

Furthermore, this Court has previously held that an appellate court may reverse a conviction on the basis of an error which deprives a defendant of due process even though it was not properly preserved for appellate review. Futrell v. Commonwealth, KY., 437 S.W.2d 487 (1969); Jackson v. Commonwealth, Ky., 450 S.W.2d 244 (1970).

Lastly, the failure of the defense counsel to request the limiting instruction can be accorded little significance when it is realized that defense counsel, prior to the commencement of the trial, moved for a continuance on the ground that he was "not ready to try" appellant's case (Assignment of Error I, supra).

To insure that the jury did not utilize the evidence of appellant's prior felony convictions in determining appellant's guilt or innocence on the primary charge, the trial judge should have given a limiting admonition or instruction to the jury. Without such a prophylactic instruction, there is no way to determine whether the jury improperly used the evidence of appellant's prior convictions of similar offenses to convict him of the primary charge of storehouse breaking.

Since the trial court denied appellant the protection of a limiting instruction, appellant's right to a fair trial was compromised. For this reason, this Court should reverse appellant's conviction and order a new trial.

IV.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY PERMITTING THE READING OF THE INDICTMENTS AND TRIAL ORDERS PERTAINING TO APPELLANT'S PRIOR CONVICTIONS.

In an attempt to prove that appellant was a habitual offender, the prosecution called as a witness, Ms. Pat Dodson, a deputy clerk of the Warren Circuit Court, to testify concerning court records pertaining to appellant's alleged prior convictions (T. E., p. 99).

After establishing that the office of the circuit court clerk serves as the depository for the records of the circuit court, the prosecutor specifically asked Ms. Dodson to "refer to the indictments" in her hand (T. E., p. 99). At that point the prosecutor directed the witness to read indictment number 9613 to the jury (T. E., p. 100). Ms. Dodson complied and read the entire indictment which alleged that appellant and another person on or about November 9, 1960 committed grand larceny by stealing "four 670 by 15 Firestone tubeless solid black automobile tires, the personal property of Gulf Oil Company" (T. E., pp. 100-101). After reading the entire indictment, Ms. Dodson at the prosecutor's request read the trial order pertaining to indictment number 9613 (T. E., p. 102). Finally, the prosecutor asked the witness to read the final order or judgment entered on that indictment. Ms. Dodson read the judgment which indicated that appellant was convicted of "grand larceny" and sentenced to be "confined at hard labor for a period of two years" (T. E., pp. 102-103).

The prosecutor next directed Ms. Dodson to indictment number 10393 and asked her to read that indictment (T. E., pp. 103-104). The indictment as read alleged that appellant committed "dwellinghouse breaking" on or about April 25, 1963 by "unlawfully and willfully and feloniously" breaking and entering "into the dwellinghouse of Mrs. Catherine Brasham on the Louisville Road . . .with the felonious intent to steal therefrom" (T. E., p. 104).

After that the witness was asked to read the final order pertaining to indictment number 10393 (T. E., p. 105). That order noted that the charged crime of dwellinghouse breaking had been amended to storehouse breaking and that appellant had entered a plea of guilty to the amended offense. The final order stated that appellant was sentenced to be confined "to the state penitentiary at LaGrange" for a period of one year (T. E., p. 105).

The prosecutor asked Ms. Dodson to "refer" to indictment number 11252 and to read it to the jury (T. E., p. 106). According to the indictment, appellant allegedly committed "the crime of armed assault with intent to rob" on January 18, 1966 by pointing "a pistol or some other offensive weapon or instrument at Jesse Willard Morgan, intending to rob him and did in a forcible and violent manner demand money" (T. E., pp. 106-107).

At that point the prosecutor asked the witness to read the final order pertaining to indictment number 11252. That judgment indicated that the charged offense of armed assault with intent to rob "was reduced to robbery" and that appellant pled "guilty to the reduced charge" (T..E., p. 107). The judgment also related that appellant's "punishment" was "fixed at two years in the state penitentiary."

Finally, the prosecutor asked Ms. Dodson if she had in her possession "an indictment bearing number 12066" (T.E., p. 108). When the witness replied affirmatively, the prosecutor asked her to read that indictment. However,before the witness commenced reading the indictment, the prosecutor approached the bench and informed the court that appellant was charged in that indictment "as an habitual criminal" (T. E., p. 108). At that juncture the prosecutor, apparently addressing appellant's counsel, asked, "Do you want her to read the whole thing or just the primary charge?" Mr. Evans, appellant's counsel, responded, "I don't

want her to read any of it" (T. E., p. 108).

After terminating the conference at the bench, the prosecutor asked Ms. Dodson to read the "entire indictment to the jury" (T. E., p. 109).

According to the indictment, appellant was charged with "the crime of storehouse breaking with two previous felony convictions" (T. E., p. 109). In describing the primary charge, the indictment stated that appellant on or about March 22, 1968, "did willfully and feloniously break and enter into the storehouse of ARA Vending Service Company . . . with the felonious intent to steal therefrom" (T. E., p. 109).

The following three counts enumerated appellant's three alleged prior felony convictions -- grand larceny in 1961, storehouse breaking in 1964, and robbery in 1966 (T. E., pp. 109-110).

At the prosecutor's request, the witness read the trial order pertaining to indictment number 12066 (T. E., p. 111). In the course of the trial order, it was stated inter alia that appellant "after conferring with his attorney desired to stipulate as to the two previous convictions and to plead guilty only as to the counts that set out previous felony convictions" (T. E., p. 113).

According to the trial order, the jury found appellant guilty of the crime charged and sentenced appellant to confinement in the penitentiary for two years (T. E., p. 116).

Lastly the witness read the final judgment which indicated that appellant was convicted of storehouse breaking with two previous felony convictions and was sentenced to confinement for two years (T. E., p. 117).

It is established law in this jurisdiction that "[p]roof of prior felony convictions in an habitual criminal case (KRS 431.190) is established by reading into evidence the judgments of prior convictions contained in the order books of the trial court." Johnson v. Commonwealth, Ky., 516 S.W.2d 648, 649 (1974). In the Johnson

case, supra, "the trial court permitted the reading of the indictments upon which the prior convictions were based in addition to the introduction of the judgments of prior convictions." Johnson v. Commonwealth, supra, at 649. This Court ruled that such a practice was error "since the judgments of convictions clearly showed the felonious nature of the previous convictions." Id.

"Only where the prior judgment is inadequate to demonstrate essential elements to evidence the defendant's conviction of the prior offense is it proper for the prosecution to introduce the indictment or warrant on which the prior offense was based." Spears v. Commonwealth, Ky., 462 S.W.2d 931, 932 (1971).

In Johnson v. Commonwealth, supra, this Court explained:

> The indictment leading to prior conviction is not relevant to issues on trial unless its introduction is necessary to establish the felonious nature of the prior conviction. Admitting indictments into evidence in addition to the judgment of conviction in many instances will result in prejudice to the defendant Id., at 649.

The facts of the instant case demonstrate the unfairness of reading the indictments which pertain to the prior felony convictions. For example, indictment number 10393 reflected that appellant had been charged with "dwellinghouse breaking" at the residence of Mrs. Catherine Bransham (T. E., p. 104). However, the judgment reflected that appellant entered a plea of guilty to the amended offense of storehouse breaking (T. E., p. 105).

Similarly indictment number 11252 dramatically describes the charged offense of "armed assault with intent to rob" by identifying the alleged victim and by referring to the use of "a pistol or some other offensive weapon or instrument" (T. E., pp. 106-107). However, the judgment omits these details and notes that appellant plead guilty to the reduced charge of robbery (T. E. p. 107).

Indictment number 12066 details not only the charged crime of storehouse breaking, but also each of the prior felony convictions involved in the habitual offender prosecution (T. E., p. 109). Not surprisingly, the final judgment contains virtually none of the objectionable material contained in the indictment.

To avoid saturating the jury with the details of the prior charges alleged against appellant, the trial court should not permit the prosecutor to elicit from the witnesses the content of indictments and trial orders which pertain to the appellant's prior convictions. See Taylor v. Commonwealth, Ky., 449 S.W.2d 208 (1970). Certainly, the reading of the indictment of a former conviction in a subsequent criminal prosecution must not be permitted unless there is some special necessity for reading the indictment. Id.

Even though appellant's counsel objected to the reading of only one of the four indictments, this error should be reviewed on appeal. Since the prosecutor in each instance specifically requested the deputy clerk to read the indictment, it can hardly be argued that the inadmissible evidence was inadvertently brought to the jury's attention. Because the prosecutor's introduction of evidence was deliberate and calculated, this error should be reviewed on the basis that the error resulted in "a manifest injustice." Stone v. Commonwealth, Ky., 456 S.W.2d 43 (1970).

Furthermore, the absence of the appropriate objection in each instance is to be expected since appellant's trial attorney informed the trial judge that the was "not ready" to try this case.

It must be remembered that when W. W. Evans told the trial court that he did not want any of the indictment read to the jury by the witness, the court below refused to support the defense and prohibit the introduction of that evidence (T. E., p. 108). Under these circumstances, it is obvious that defense objections to the reading of the other three indictments would have been equally futile.

Under the circumstances of the case at bar, appellant was substantially prejudiced by the prosecutor eliciting from a prosecution witness the contents of the indictments and trial orders pertaining to appellant's four prior felony convictions. Accordingly, appellant's conviction must be reversed and a new trial ordered.

V.

THE PROSECUTOR'S IMPROPER COMMENTS DURING CLOSING ARGUMENT CONSTITUTED ERROR WHICH SUBSTANTIALLY PREJUDICED APPELLANT AND DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO "FUNDAMENTAL FAIRNESS."

During the course of his closing argument, the prosecutor made the following comments:

> Now, ladies and gentlemen, I believe that we should give every man a chance. We ought to give a man a second chance and if there are extenuating circumstances, if he's young, maybe we ought to give him two chances and if as counsel claims, he comes from quote the wrong side of the tracks end quote, maybe we ought to give him three. Should we give him four? Should we give him five? Does there come a time when we should draw the the line? Do you realize, ladies and gentlemen what it has cost the Commonwealth of Kentucky for this one man in the last ten years? Do you realize what he's done to us? Sixty separate individuals served on grand juries that were obliged to hear charges against this man and sixty separate individuals participated in returning indictments against him. Because he had three jury trials including this one, thirty-six jurors -- (T.E., p. 147).

At this juncture, appellant's counsel interrupted the argument, stating:

> Your Honor, I object to that as improper. The cost of the trial has nothing to do -- (T.E., p. 147).

Without allowing defense counsel to continue, the prosecutor resumed his objectionable argument:

> I'm speaking about the cost of the trial. I'm not talking about cost in dollars and cents. Thirty-six jurors have sat and listened to cases against Wickie Boyd. Two prosecuting attorneys, jailers, wardens, guards, deputy sheriffs, policemen, police detectives and at least seven busy defense lawyers (T.E., pp. 147-148).

Here defense counsel reiterated his objection:

> Your Honor, I object because that has nothing to do with the trial of this case. It's prejudicial (T.E., p. 148).

The trial court overruled the defense objection on the basis that the Commonwealth Attorney was merely "talking about instruction number four" (the habitual offender instruction).

With the explicit approval of the trial court, the prosecutor resumed this line of argument:

> I believe it has everything to do with this case because you must fix the punishment and you must decide whether it is fair and just, whether it is honorable or not to impose a severe sentence. You must decide what is the proper sentence in this case (T.E., p. 148).

Even if the prosecutor's comments were intended only to express his own indignation at the cost, time, and manpower exerted to try and convict appellant four times previously, those remarks still had no place in a court of law. The prosecutor's attempt to catalogue the people who had been involved in appellant's previous trials injected into the case at bar extraneous issues. It must be remembered that:

> The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law . . . . American Bar Association, Standards Relating to The Prosecution Function, Standard 5.8(d).

Furthermore, the prosecutor's harangue about appellant's four prior encounters with the Kentucky courts and the burden those trials created on the judicial system was not based on the evidence of record.

In Section 5.9 of the Standards Relating to The Prosecution Function, the American Bar Association explains:

> 5.9 Facts outside the record.
>
> It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

It is, of course, an accepted principle of law that the closing argument to the jury should be confined to the facts brought out in the evidence. Collins v. Commonwealth, Ky., 396 S.W.2d 318 (1965).

The time, money and manpower expended in convicting appellant on four previous occasions was obviously not an issue for the jury's consideration in the case at bar. Consequently, this argument by the prosecutor was both improper and objectionable. Since the prosecutor admitted this argument was calculated to induce the jury to impose "a severe sentence," the prejudicial impact of the argument is undeniable.

The trial court's failure to sustain appellant's objection to this prejudicial line of argument constituted reversible error.

Later in his summation the prosecutor discussed the habitual offender statute and argued:

> What our legislature has done, what our legislature has authorized is a certain punishment for certain crimes but they have said to you ladies and gentlemen who serve on the jury that there comes a time when society is entitled to a rest, when society is entitled to be rid once and for all, of a persistent, habitual criminal. If you think that Wickie Boyd will not return and commit another crime, if you think that his pattern of behavior indicates that he can go straight in the future, if you believe that the evidence shows that, then of course, the habitual criminal sanction should not be brought into force. But if you believe that a pattern of criminal behavior extending back at least until 1960, ten long years of repeated serious felony crimes, if you believe that this demonstrates the pattern of behavior which is likely to continue in the future, then you ought to remove him from society and put him where he can no longer harm the members of this community (T.E., pp. 148-149).

In this portion of his closing argument, the prosecutor told the jury that the legislature established the habitual offender statute to enable society "to rid" itself "once and for all" of the habitual criminal. The prosecutor told the jury that they could "remove" appellant "from society and put him where he can no longer harm members of this community" (T.E., p. 149).

It has been held improper for a prosecutor to suggest that if the defendant were acquitted he would commit further crimes. See Russell v. State, 233 So.2d 154 (Fla. App. 1970); Chavez v. State, 215 So.2d 750 (Fla. App. 1968); Avey v. State, 1 Md. App. 178, 228 A.2d 614 (1967); Lime v. State, 479 P.2d 608 (Okla. Crim. App. 1971).

Similarly, the prosecutor acts improperly when he suggests that if the defendant is not permanently incarcerated he will commit further crimes upon his release from confinement. This Court has recognized that it is improper for a prosecutor to argue that the infliction of the severest punishment is necessary to protect the local community. Tate v. Commonwealth, 258 Ky. 685, 80 S.W.2d 817 (1935).

Recently in Dennis v. Commonwealth, Ky., 527 S.W.2d 8, 10 (1975), this Court condemned the argument by a prosecutor "to the effect that the jurors, if they fail to convict, cannot complain if they become victims of crime." This Court in Dennis emphatically stated:

> A Commonwealth's Attorney should limit himself to reasonable comments upon the evidence and reasonable inferences which may be drawn therefrom. Id., at 10.

In the course of his closing argument, the prosecutor made the following inflammatory appeal to the passions and prejudices of the jury:

> They [appellant and Leon Sill] got in and they stacked up some $3,300 worth of guns and ammunition with a few binoculars and I think a few other things tossed in. Now, what did these men want with that many guns? What did they want all that ammunition for? What was Wickie going to do with all of that? Use them? Market them? No. More violence to be spread through our community by this very action (T.E., p. 150).

When the prosecutor asserted in his closing argument that appellant intended to steal the weapons and ammunition so he could spread violence through the local community, the trial judge should have interrupted and halted such argument since there was no evidence to support such a theory and the obvious intent of the argument was to inflame the jury.

This type of argument is prohibited by Standard 5.8(a) of the American Bar Association's Standards Relating to The Prosecution Function, which states:

> It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

The most elementary rule governing the limits of argument is that it must be confined to the record evidence and the inferences which can reasonably and fairly be drawn therefrom. Assertions of fact not proved amount to unsworn testimony of the advocate, not subject to cross-examination. See Commentary, Prosecution Function, Standard 5.8(a).

In the case at bar there was absolutely no evidence in the record to support the prosecutor's assertion that appellant, if successful in this theft of guns and ammunition, would have terrorized the local citizenry. Consequently, the prosecutor's inferences were both unreasonable and unfair. It has long been established that "It is not candid or fair for the lawyer . . . in argument to assert as a fact that which has not been proved." American Bar Association Canons of Professional EThics No. 22 (1968).

This Court has often recognized that the closing argument to the jury should be confined to the facts brought out in the evidence. Collins v. Commonwealth, Ky., 396 S.W.2d 318, 320 (1965). The prosecutor, in argument, "should refer only to evidence heard from the witness stand and should scrupulously keep within the record." Bowling v. Commonwealth, Ky., 279 S.W.2d 23, 24-25 (1955).

The prosecutor's argument runs afoul of another prohibition contained in the Prosecution Function, supra. Standard 5.8(c) of that work specifically states:

> (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

Certainly when the prosecutor embellishes his speculative inferences with a phrase like "more violence spread through the community" he is obviously striving to appeal to the jurors' passions. By depicting a narrowly averted rampage of violence, the prosecutor undeniably intended to cultivate the fears and prejudices of the jury to insure a guilty verdict and a life sentence.

It is a prosecutor's "duty to see that no statement that is calculated to mislead the jury or stir up prejudice in their minds is made." Bowling v. Commonwealth, supra, at 25.

Later in his summation to the jury the prosecutor argued:

> I'm concerned with Wickie and I know you are and I think if you will look at the record and you will recall Miss Dodson's testimony from the record, you'll see that every time Wickie has come before this court, he has been given a break. You heard the testimony and -- (T.E., p. 150).

Appellant's counsel immediately objected, saying:

> That's not true, Judge and I object to that. He hasn't been given a probated sentence any time (T.E., p. 150).

In retaliation to the objection, the prosecutor responded:

> If there was ever a man that didn't deserve one, it's Wickie Boyd (T.E., pp. 150-151).

Appellant's counsel objected to statement by the prosecutor (T.E., p. 151). When the trial judge asked defense counsel for the basis of his objection, the following colloquy occurred:

> MR. EVANS: There's no evidence in that. He, uh-- There's no evidence to show whether he got a break or didn't get a break. That's--that's completely voided. Thereis no basis for that statement.
>
> COURT: Which?
>
> MR. EVANS: That he's been given a break every time he came to court (T.E., p. 151).

The trial court then asked the Commonwealth Attorney's basis for his statement and received the following answer:

> Your Honor, the records will reflect that Wickie Boyd was fortunate enough to get minimum or near minimum sentences every time he came into court. The records reflect as Miss Dodson read. The serious charges were amended so that even lighter sentences were given-- could be meted out to Wickie Boyd, for example, armed robbery charge amended to robbery. For example, dwellinghouse breaking charge which carries a two-year minimum, amended to storehouse breaking (T.E., p. 151).

Appellant's counsel interrupted and lodged the following objection:

> Your Honor, I object to that statement being made to the Court in the presence of the jury (T.E., p. 151).

Nevertheless, the trial judge overruled the defense objections enunciating this ratiocination:

> I think it should be overruled because the indictment speaks for itself (T.E., p. 151).

Here again the prosecutor interjected extraneous issues into the trial and argued facts not in evidence. Although the prosecutor contended that the records pertinent to appellant's prior convictions indicate that "[t]he serious charges were amended so that even lighter sentences could be given," this is not so. While the records (including inadmissible indictments and trial orders)

do reflect that certain of the original charges were amended to allege lesser included offenses, this fact does not mean that these amendments were accomplished to "give a break" to appellant. It is just as possible that appellant was originally "overcharged" in the indictments and the prosecution had to request the amendments to conform to the available proof. The prosecutor's argument is speculative and not based on facts in the record.

Counsel are usually respected members of the legal profession and often leaders in the community. When, as in the case at bar, the Commonwealth Attorney alludes to evidence which has not been presented in court, the members of the jury may conclude that the basis of that statement is other information and records of which only the Commonwealth Attorney has knowledge. See Edwards v. Commonwealth, 298 Ky. 366, 182 S.W.2d 948 (1944).

When the prosecutor announced in the jury's presence that appellant did not deserve a probated sentence, he again created prejudicial error. By this statement, the prosecutor labelled appellant as a miscreant inherently undeserving of even the opportunity for probation. Such a remark, made by an elected judicial officer, could hardly have gone unnoticed by the jury. However, the trial judge summarily overruled defense counsel's objection to this improper statement.

In view of the fact that the prosecutor's closing argument was replete with improper and inflammatory comments, the possibility and, indeed, the probability of prejudicial impact is increased to the point of certainty. See Rodriguez v. Sandoval, 409 F.2d 529, 531 (1st Cir. 1969). Since this error does not involve an isolated remark by the prosecuting attorney, but instead a pattern of argument, the

existence of prejudice to appellant is beyond dispute. When the prosecutor has "pursued a course of action deliberately calculated to cause the jury's decision to be influenced by improper factors," it is inescapable that the prosecutor has "overstepped the bounds of propriety and fairness." Accordingly, the conviction must be reversed. Faulkner v. Commonwealth, Ky., 423 S.W.2d 245 (1968).

Where, as in the case at bar, it clearly appears that the argument has gone beyond bounds necessary to fasten guilt and has taken undue advantage of the accused, this Court has always reversed on the ground of improper argument. Webb v. Commonwealth, Ky., 451 S.W.2d 397, 398-399 (1970).

As the Supreme Court has reiterated time and again, "[e]xercise of calm and informed judgment . . . . [a jury's] members is essential to proper enforcement of law." Turner v. Louisiana, 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965) citing Sinclair v. United States, 279 U.S. 749, 765, 49 S.Ct. 471, 73 L.Ed. 938 (1929). Highly prejudicial remarks uttered by the prosecutor jeopardize the jury's deliberative processes and hence infringe upon an accused's right to a fair hearing on the merits of the case. Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973).

The Supreme Court has recognized that a prosecutor's egregious misconduct in closing argument can amount to a denial of constitutional due process. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 1873, ___ L.Ed.2d ___ (1974). In the case at bar the totality of the prosecutor's improper argument, under the circumstances, did not comport with the "fundamental fairness" requirement of due process.

As explained above, appellant's counsel objected to certain improper comments by the prosecutor, but neglected to object to all of the prejudicial arguments discussed in this assignment of error. Nevertheless this Court should review this entire allegation of error since the prejudicial comments of the prosecutor, when cumulated, resulted in "a manifest injustice." Stone v. Commonwealth, Ky., 456 S.W.2d 43 (1970).

Additionally, the Sixth Circuit Court of Appeals in United States v. Black, 480 F.2d 504 (6th Cir. 1973), held that even where no objection is made to a prosecutor's improper closing argument, an appellate court should intercede "where the error would seriously affect the fairness, integrity or public reputation of judicial proceedings." Id., at 507.

For the reasons set forth above, it is evident that the improper and inflammatory remarks delivered by the prosecutor during his closing argument substantially prejudiced appellant and deprived him of a fair trial.

CONCLUSION

For the foregoing reasons, we respectfully request that the judgment of the lower court be reversed.

Respectfully submitted,

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